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**IN THE SUPREME COURT OF THE STATE OF ALASKA**

J.P. and S.P. (Foster Parents),	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
State of Alaska, DHSS, OCS, G.C.	)	Supreme Court No.: S-18107
(Mother), W.F. (Father) and Sun'aq	)	
Tribe of Kodiak,	)	
	)	
Appellees.	)	

Trial Court Case No.: 3AN-17-00032CN

**OCS'S RESPONSE TO COURT'S JULY 9, 2021 ORDER**

The State of Alaska, Department of Health and Social Services, Office of Children Services responds to the two questions raised by the Court in its July 9, 2021 order. J.P and S.P. (the foster parents) are parties able to maintain an appeal because the superior court implicitly allowed them to intervene on the issue of placement and the Sun'aq Tribe of Kodiak's (Tribe) request to transfer. The foster parents' challenge to the transfer order does not meet the public interest exception to mootness because, although capable of repetition, review is not likely to be repeatedly circumvented. A court may stay transfer of jurisdiction to allow parties sufficient time to seek appellate review.<sup>1</sup>

**I. The superior court implicitly allowed the foster parents to intervene on the issue of placement and the Tribe's request to transfer.**

Although the superior court did not expressly grant the foster parents party status, it treated the foster parents as parties by allowing them to participate in the

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<sup>1</sup> The Court has already directed the superior court to fashion future transfer orders in a way that allows parties to seek a stay and appellate relief. *See* July 9, 2021 Order, at 5 n.6.

placement proceedings and by allowing them to challenge the motion to transfer jurisdiction. [See Mother's App'x at 21, 27-28, 30, 165-67] This is not to say that the superior court acted within its discretion under Civil Rule 24(b) by allowing the foster parents to intervene.<sup>2</sup> Nor is it an endorsement of the superior court's decision not to require a written motion from the foster parents or its failure to issue a written order clarifying the foster parents' status in the litigation. It is simply an acknowledgment of the status implicitly granted to the foster parents by the superior court and a recognition that the foster parents are likely parties able to maintain an appeal.<sup>3</sup>

The record is admittedly unclear, but the superior court appeared to give the foster parents the ability to participate in the placement proceedings without filing a written motion to intervene. During the March 10, 2021 hearing, counsel for the foster parents tried to clarify whether the superior court would require a written motion to intervene for purposes of participating in the placement hearing. She stated, "I want to make sure that there is a[n] agreement among the parties that I can intervene for the limited purpose of the placement hearing[.]" [Mother's App'x at 27] She then explained, "I will absolutely follow that up with a written motion *if necessary*, but I think I understand I can file this motion [(the motion to continue)] tomorrow by the close of business and that would be sufficient for now." [*Id.* (emphasis added)] The

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<sup>2</sup> See *State, Dep't of Health & Soc. Svcs. v. Zander B.*, 474 P.3d 1153, 1164 (Alaska 2020) ("Foster parent intervention should . . . be the rare exception rather than the rule.").

<sup>3</sup> Should the Court accept the appeal and not dismiss it for lack of jurisdiction and mootness, any of the appellees have the ability to cross-appeal the superior court's decision to allow the foster parents to participate as parties. See Appellate Rule 204(a)(2).

superior court responded by saying, “That’s correct.” [*Id.* at 28] It then instructed counsel that “[she] could file simultaneously, a notice of limited appearance, but you (indiscernable) a court to file a –the – for a continue of the hearing currently set on the 16<sup>th</sup>.” *Id.* At no point did the court respond to counsel’s question and instruct her to file a written motion to intervene.

Subsequent to that hearing, both the State and the guardian ad litem treated the foster parents as parties, including on the issue of transfer. For example, the biological parents filed a motion to strike the foster parents’ motion to stay, arguing that it should not be considered as they were not a party to the case. [Mother’s App’x at 146-49, 155] The State responded by filing a non-opposition to the foster parents’ motion to stay and opposing the biological parents’ motion to strike. [*Id.* at 156-57] It argued that the court should stay the proceedings—and retain jurisdiction—at least until the court had considered the foster parents’ motion for reconsideration. [*Id.* at 156] Although the State acknowledged that the “foster parents have limited standing in a CINA case and should not be treated as parties for purposes of addressing issues other than placement,” the State opposed the biological parents’ motion to strike because the superior court’s “decision regarding transfer of jurisdiction directly impact[ed] the foster parents’ (and guardian ad litem’s) ability to litigate the issue of continued placement with them.” [*Id.* at 157] The guardian ad litem joined the State’s support for the foster parents’ motion to stay as well as its opposition to the motion to strike. [*Id.* at 164] Prior to the filings on the motion to stay, the guardian ad litem had also joined the foster parent’s opposition to the Tribe’s motion to transfer. [*Id.* at 63]

Therefore, because the superior court implicitly allowed the foster parents to intervene regarding placement and the transfer of jurisdiction, and because the State and the guardian ad litem reacted by treating them as parties, the State does not object to the Court accepting their notice of appeal.

**II. The foster parents' appeal of the transfer order is moot and the issue does not meet the public interest exception to mootness.**

The State does not object to the foster parents' status as parties for the purpose of filing an appeal, but this Court should nevertheless dismiss the appeal.<sup>4</sup> The foster parents' challenge of the transfer order is moot because this Court does not have the ability to grant the foster parents any relief,<sup>5</sup> and the issue does not meet the public interest exception to mootness because it will not continually evade review.<sup>6</sup> As the Court has already recognized, superior courts can preserve the issue simply by giving aggrieved parties sufficient time to file a request for a stay and the opportunity to seek appellate review,<sup>7</sup> just as a different superior court did in a separate matter when it

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<sup>4</sup> As the Court recognized in its July 9, 2021 Order, it does not have appellate jurisdiction to directly review the Tribal Court's placement order.

<sup>5</sup> *Peter A. v. State, Dep't of Health & Soc. Svcs.*, 146 P.3d 991, 994 (Alaska 2006); *see also* July 9, 2021 Order, at 4 (recognizing that the foster parents' appeal of the order transferring jurisdiction was moot).

<sup>6</sup> *Peter A.*, 146 P.3d at 996. In deciding whether to hear a moot appeal, the Court considers whether the disputed issue is capable of repetition, whether it is capable of being repeatedly circumvented, and whether it is so important to the public interest as to justify overriding the mootness doctrine. *Id.* The State acknowledges that the foster parents can arguably satisfy two of the factors—the issue is capable of repetition and it is important to the public interest. *See id.*

<sup>7</sup> *See* July 9, 2021 Order, at 5 n.6.

transferred jurisdiction of post-termination proceedings to a tribal court.<sup>8</sup> In *Native Village of Chignik Lagoon v. State, Department of Health and Social Services*, the superior court issued its transfer order on May 21, 2021, but did not make it effective until June 10, giving the Native Village of Chignik Lagoon sufficient time to file an appeal and seek a stay. The superior court then granted the motion to stay on June 4, and the appeal is now pending before this Court.

Like the Court, the State recognizes the noble service of the foster parents in caring for this child, and their continued desire to serve his best interest by participating in the lower court proceedings and pursuing this appeal. But this Court can no longer grant them relief, and a proper weighing of the public interest exception factors does not justify the Court exercising its discretion to hear a moot appeal.


### CONCLUSION

The State does not object to the Court accepting the appeal, but the State respectfully requests that the Court dismiss the appeal as moot (transfer order) and for lack of jurisdiction (review of the Tribe's placement order).

DATED August 3, 2021.

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<sup>8</sup> See *Native Village of Chignik Lagoon v. State, Dep't of Health & Soc. Svcs.*, S-18090.

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**CERTIFICATE OF SERVICE**

I certify that on August 3, 2021, a true and correct copy of **OCS's Response to Court's July 9, 2021 Order** and this **Certificate of Service** were served via electronic mail on the following:

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